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MATERIALS ON CONFLICTS

Volume 1

Professor John Swan

1983 - 1984

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I am grateful for the help that I have received from Alice Ng and Martha Mackinnon in the production of these materials. Alice has typed and re-typed these pages more times than I (and I expect, she) would care to think about. She has been always cheerful and willing to make the final product look as good as it can. She takes no responsibility for the substance. Martha has been of immense help in producing a revision that is far more extensive than she and I had originally contemplated. She has stimulated me to seek clarity of both thought and style and the result of our co-operation is a much better set of materials than would otherwise have been produced.

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Part A. Introduction

In most cases that come before the courts of a Province all the facts--or, at least, all the relevant facts--have occurred in that Province. When there are relevant facts that have occurred outside the Province, the rules and principles of the Conflict of Laws are used to reach a solution. In other words, the subject matter of the Conflict of Laws consists of cases with geographically complex facts. The reason that these kinds of cases present special problems is that in a case that has relevant factual connections with, for example both Ontario and Quebec, there may be an argument that the rights of the parties should be sorted out with reference to Quebec rather than Ontario law. Again, the presence of non-Ontario facts may be a reason that the Ontario courts should not take jurisdiction to hear the claim presented by the plaintiff.

Any case of any kind may present such kinds of facts. In practice, the approach of a Canadian court to a criminal case where, for example, the crime was committed outside Canada is determined by the Criminal Code. Again, problems of extraterritorial taxation and administrative regulation are typically resolved by the application of statutory rules which cover all the issues presented to the court. The principal scope for the rules and principles of the Conflict of Laws are cases in the private law field--contracts, property, torts, family law, succession, bankruptcy etc. We will see that, while some of the potential problems have been resolved by statute, there remains a large area where solutions can only be found in the approaches developed by the judges.

The principal difficulty in understanding conflicts cases arises from the fact that there is no universally accepted approach to the problems presented by the courts. Here, almost more than in any area of the law, the problems of words and concepts as prisons for judicial thought and as substitutes for analysis loom large. Only when the issues have been reduced to the most basic level of analysis that is possible will any solution be found. It is therefore necessary to set out some very fundamental propositions which we shall have to worry about throughout the course.

Law is a rational enterprise. This may seem to be nothing but a statement of the obvious. However it is often forgotten and its consequences are interesting and worth exploring in some detail. The first consequence is that every decision made in the context

of the law must reflect the inherent demands of rationality. We would be offended if a judge were to decide a torts case by flipping a coin. We might say that to decide the case in this way would be cheaper and likely to be right in enough cases--after all, in some cases the plaintiff wins and in others the defendant does, and by flipping a coin we would create the same situation. We would reject this as an appropriate method because we would regard it as irrational to decide cases in this way. (This is not to deny that there may be cases where the claims of one party may have to be decided by chance, e.g., an action brought on a Wintario ticket with a winning number.) A rational disposition of tort claims may require an examination of fault, intention or the allocation of risk. If we find that any decision is one that depends on irrelevant factors then we may be concerned about how well the judge did his or her job.

There are, of course, limits on how far the process of rationality can be pushed. The achievement of a fully rational system may be frustrated by the fact that the court cannot get adequate access to the facts. Here the court may have to do the best job that it can with the information that it has, and, in examining the court's decision we may be hampered in exactly the same way. We accept this second-best result because the costs of getting the information may be too high, or, at least, too high for the parties to bear. Again there may be cases where a rational analysis leads to a logical impasse. If a court finds that both parents are equally desirous and deserving of the custody of a child, the dispute may only be resolvable by a decision that might as well be made by a flip of the coin. It says something about our belief in the need for rationality that even here a judge would not flip a coin in open court.

The second consequence is that one has to respect the demands of the judicial process if that is the way in which the problems that come up are going to be solved. The judicial process is characterized by the way in which the parties participate. The parties participate in the process under the common law by having, (a) the chance to present the facts to the court, and (b) the opportunity to present reasoned arguments. Before one can make a reasoned argument one has to know what criteria are likely to be considered by the court. At the same time one has to know what facts are required by the legal rules or principles that are or might be applicable so that the necessary facts, if they exist, can be brought before the court. There is therefore a close relation between the process of judicial decision-making and the requirement of rationality.

The third consequence is that we can talk rationally about the solutions that the law reaches for the problems it has to solve. Law must make sense. Simply, the decision must be justified by reference to non-legal criteria. Much of your time

in courses like contracts and torts will have been spent in worrying about such justifications. Since we will be looking at conflicts cases that raise contract and tort problems the issues will be very much the same. The important thing is not that we necessarily agree over what result does make sense or that we can agree on the criteria by which we determine what is a sensible result, but that we can talk about these things. As you read each case, consider whether the result is sensible or not and how you have determined that issue.

The principal focus of this course will be on the methods that the courts have adopted to solve conflicts problems and on the consequences of these methods. It is the case that the area of conflicts has been (and is), for better or for worse, the preserve of the academics and we shall examine their contributions carefully.

The traditional method of analysis adopted by the Canadian courts has been almost exclusively based on the decisions of English judges and the writings of English academics. This approach is heavily characterized by a conceptual analysis. It will be seen that this presents major problems, and ways to avoid these will have to be explored.

One further point requires emphasis. An understanding of Conflicts is no different from an understanding of any other area of the law. And, similarly, there is no such thing as a single understanding. In Contracts, for example, a thorough knowledge of Cheshire & Fifoot (M.P. Furmston, Cheshire and Fifoot's Law of Contract, 9th ed., (London: Butterworths, 1976)) could be regarded as an understanding of the law. But a Cheshire & Fifoot understanding is not the same as a Waddams (S.M. Waddams, The Law of Contracts (Toronto: Canada Law Book Ltd., 1977)) understanding, and a Waddams understanding is not quite the same as a Swan & Reiter (J. Swan and B.J. Reiter, Contracts: Cases, Notes & Materials, 2d ed. (Toronto: Butterworths, 1982)) understanding. It can be argued that a Cheshire & Fifoot understanding is an impoverished, inadequate or unhelpful understanding or that a Swan & Reiter understanding is wildly unrealistic and inaccurate. The point to remember is simply that there are different understandings and that each has certain characteristics and, what is more important, is based on certain assumptions about law, its purpose in society and the values that it represents. After these have been spelled out, you may conclude that you cannot accept a particular understanding. If, for example, you believe that the law of contracts exists to serve identifiable social values and to give effect to the parties' reasonable expectations, then the Cheshire & Fifoot understanding will be unsatisfactoy, for it is based on a different set of assumptions.

The same variety occurs in what an understanding of Conflicts is. These materials will explore at least two general types of understandings. The equivalent of the Cheshire & Fifoot understanding in contracts is Dicey & Morris (Dicey & Morris, The Conflict of Laws, 10th Ed. (London:

Stevens, 1980)). A large number of competing understandings are based on work done by two people in the U.S. They are Brainerd Currie and David Cavers. We shall examine their contributions in detail later. (Supra, pp. 383, 398, 440).

As well as these approaches to conflicts, these materials will seek to develop a third understanding. They seek to develop what can be called (somewhat pretentiously) a principled approach. The features of such an approach will be elaborated in the context of the materials that follow. The governing purposes of such an approach are two:

1. Fairness to the individuals caught up in the toils of the law, and

2. Predictively useful rules.

These goals suggest a simultaneous and equal concern for the result in the individual case and for the development of rules. Such a concern can easily be seen as involving a direct contradiction. It is often thought that either one has no rules and regards fairness and justice as the dominant or governing goal or one has rules and one lives with the impact of their application might have on an individual in a concrete case. It is, I believe, very important to deny, and to demonstrate the validity of the denial that such a contradition exists. Rules have no justification unless their application in the individual case is fair and forwards identifiable social policies. Fairness has no content unless it contributes to the development of predictively useful rules. Never forget that as Holmes said, ("The Path of the Law" (1897), 10 Harv. L. Rev. 457) "It is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV". In the context of Canadian conflicts we need only exchange "Henry IV" for "the nineteenth century" or "Dicey & Morris".

This is strong language. But remember that Holmes said only that it is revolting to have "no better reason ...." He did not say that the mere fact that the rule is ancient is a reason for rejecting it. Similarly the mere fact that a particular conflicts rule is enshrined in Dicey & Morris does not mean that it is necessarily wrong. What Holmes meant was that no rule justifies its application merely by existing. We must always ask, "Does the application of this rule make sense (forward some identifiable social policy, conduce to fairness, etc.) in the context of this particular case? This question is not answered by the ritual incantation of any rule.

It is part of the purpose of this course to show you what the courts and academics are now doing in conflicts cases. This is an extremely important part of the course. You simply must

know the basis from which the courts are likely to reason, or, at least, to begin to reason. We start, therefore, by examining in each area of the course the traditional and generally accepted rules. Once these have been explored it is both possible and profitable to explore the issues raised by the cases more fully.

The course materials following deal principally with four areas of law in which conflicts problems arise: the substantive areas of contracts torts, family law, and the procedural issues of jurisdiction and recognition and enforcement of foreign judgments. The problems are by no means limited to these areas, however, and students who, for example, are considering writing a major paper, may wish to explore developments in other fields. Possible topics include corporate law (for example, securities, anti-trust law, see p. 298), commercial law (or more specifically conflict of laws and secured transactions or bills of exchange), or the role of constitutional law and the federal system in conflicts problems in Canada. Almost any area of law lends itself to an analysis from a conflicts perspective. A variety of specific topics have been dealt with by students in previous years (which may give some indication of the wide choice available) including conflict of laws in life insurance, international commercial arbitration, international banking, corporation law, trusts, conditional sales and anti-trust. You will find that the conflict of laws is a rich area for research, whether you relate the materials herein to a topic not specifically covered by the course, or prefer to focus on an aspect of conflicts law in family, torts, contracts, or procedure.